

SEP 03 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ON THE HOUSE SYNDICATION, INC., on
behalf of themselves and all others similarly
situated; CAREY BROS INC., on behalf of
themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellee.

No. 02-56158

D.C. No.
CV-99-01336-RMB(JFS)

MEMORANDUM*

ON THE HOUSE SYNDICATION, INC., on
behalf of themselves and all others similarly
situated; CAREY BROS INC., on behalf of
themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellant.

No. 02-56234

D.C. No. CV-99-01336-RMB

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted July 9, 2003
Pasadena, California

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges

On July 31, 1997, Defendant Federal Express (“FedEx”) issued a press release notifying its customers of an impending strike at United Parcel Service (“UPS”) and detailing the measures it was taking to avoid disruptions in service. In that press release, FedEx stated: “*As provided in our Service Guide* and until further notice, we will not offer money-back guarantees.” (Emphasis added.) The above quoted language did not purport to amend the Service Guide; rather, it purported to be consistent with it. The clear import of the language is that FedEx believed that the UPS strike triggered the *force majeure* clause in the Service Guide and relieved it of its obligation to pay the Money-Back Guarantee. Customers who contracted with FedEx during the Class Period were, or should have been, aware of FedEx’s interpretation of its Service Guide. Any shipment after the date of the press release must be presumed to have been made with

knowledge not only of the Service Guide itself, but also of FedEx's interpretation of that Guide in the context of the UPS strike.

Because of FedEx's construction of the Service Guide reflected in the July 31 press release, we hold that FedEx did not breach its Money-Back Guarantee provision during the Class Period. Any reasonable person reading FedEx's press release of July 31 could come to only one conclusion: Until further notice, FedEx was not offering money-back guarantees. *See* REST. (SECOND) OF CONTRACTS § 201 (2003) (explaining that where the first party "did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party," the contract term shall be interpreted according to the meaning attached by the first party). The judgment in favor of Plaintiffs on the Money-Back Guarantee claim is therefore reversed.

We affirm the district court's judgment in favor of Defendant on the Excess Charges claim. To the extent Plaintiffs rely on the "Invoice Adjustment" provision in the Service Guide, they offer no excuse for their failure to comply with the notice requirements set forth in that provision. The provision states that requests for invoice adjustment "must be received within one year after the date of shipment if the overcharge was caused by [FedEx]." Neither the July 31 press release nor the telephonic recording purported to suspend or otherwise affect a

customer's right to request invoice adjustment. Plaintiffs are therefore barred from recovering on this theory.

To the extent Plaintiffs cast their Excess Charges Claim as a traditional common law suit for damages due to breach of contract, the claim is also barred by Plaintiffs' failure to comply with the contractual notice requirements. The Service Guide expressly states that FedEx "must receive written notice of claim due to damage [or] delay . . . within 15 days after delivery of the shipment" and "within 90 days after [FedEx] accept[s] shipment" for all other claims. Nothing in the July 31 press release or the telephonic recording purported to suspend a customer's right to pursue a claim for damage against the company.

Plaintiffs argue that the Service Guide does not expressly state that compliance with the internal claims procedures is a prerequisite to bringing a damages action in court. While this is true, the Service Guide does use mandatory language and it expressly states that the "FAILURE TO COMPLY WITH [THE] [NOTICE] CONDITION[S] MAY RESULT IN THE DENIAL OF A CLAIM." Other cases that have addressed the FedEx Service Guide's notice of claim provisions have interpreted them as requiring compliance as a prerequisite to suit. *See, e.g., Williams v. Federal Express Corp.*, 1999 WL 1276558 at * 4 (C.D. Cal. 1999) ("Read together, the airbill and Service Guide require that written notice of

claim be filed within ninety days after FedEx accepts a package for shipment. . . .

Because Williams failed to file a claim within ninety days after FedEx accepted the shipment, he cannot recover damages.”).

We need not reach the remaining issues raised on appeal.

REVERSED IN PART; AFFIRMED PART. Each side to bear its own costs on appeal.